Neutral Citation No. [2010] NICA 28

Ref:	**GIR7888**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**23/6/10**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

SEAN DEVINE

Plaintiff/Respondent;

and

DANIEL McATEER

Defendant/Appellant.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] The defendant/appellant who appeared on his own behalf before the trial judge Deeny J on the trial of the action brings this appeal against the judgment of the trial judge delivered on 18 December 2008 and the order made thereon wherein the plaintiff/respondent ("the respondent") was awarded £20,000 with interest at 6% from the date of the writ in the action delivered on 3 August 2006.

[2] The proceedings arose out of allegations by the respondent that the appellant negligently, in breach of contract and in breach of fiduciary duty so managed the affairs of a company called Roe Development Limited and so advised the respondent that the respondent lost the fiscal benefits relating to an Enterprise Investment Scheme which should otherwise have been available to the respondent arising from his investment of monies by way of an acquisition of shares in the company.

[3] The trial judge found the appellant as accountant and tax adviser liable for breach of contract and in tort and held that he failed to ensure that the invested monies were employed in a way consistent with the statutory pre-conditions to the fiscal advantage. In order to obtain the relief available the investment had to be employed within 12 months of receipt of the sum invested pursuant to Section 289(1)(c) of the Income Taxes Act 1988 as amended. The trial judge found that this had not been done. The EIS relief which had initially been granted to the respondent was subsequently withdrawn. The court found that this had occurred because it had been admitted by the second defendant (although without the agreement of Mr McAteer) that the company had not complied with the EIS rules.

[4] Mr Ronan Lavery appeared on behalf of the appellant on the hearing of the appeal. Coming into the appeal at a late stage and without the benefit of a transcript or previous knowledge of how the trial had evolved he was obviously at a considerable disadvantage but the manner in which he assisted the court in his submissions has helped to bring focus to the issues raised and the court is grateful to him for his assistance.

[5] At the outset of the appeal Mr Lavery indicated that the appellant sought to introduce in evidence material which it was argued had in fact been or should have been before the trial judge before judgment was delivered and which was not dealt with or mentioned by the trial judge in his judgment. In particular the appellant sought to rely on the contents of a letter dated 10 June 2008 from Mr Greg Lewis an inspector of taxes based in the Small Company Enterprise Section of the Inland Revenue in Cardiff. In that letter Mr Lewis expressed the following view:-

> "On the basis of the information provided I can confirm that the company has employed the all money (sic) raised by the share issue of 1 March 2000 within 12 months of the date of the share issue and that there was no reason, relating to the employment of the money, to withdraw any relief from the share issue."

[6] It was the appellant's case that he had in his oral testimony referred to communications he had had with the Revenue relating to the question of

whether EIS relief was or should have been withdrawn because of the way in which the money invested by the respondent in the company had been employed. The opinion expressed by Mr Lewis in his letter of 10 June 2008 was not in existence by the time the evidence concluded before the trial judge although it came into existence after that and before the trial judge delivered judgment. The appellant claimed that he sent a letter dated 17 June 2008 to the Chancery Office with copies of the letter and enclosures dated 2 June 2008 from the appellant to Mr Lewis and the letter from Mr Lewis dated 10 June 2008.

[7] Submissions were made by the parties on whether the pre conditions set out in Ladd v. Marshall [1954] 1 WLR 1489 for the introduction into the appeal of fresh evidence were satisfied, the fresh evidence which the appellant was seeking to rely on being the materials relating to communications between the appellant and Mr Lewis. Mr Coyle opposed the admission of the evidence contending that it was evidence which could with reasonable diligence have been obtained before trial; it was not evidence which would have an important influence on the result; and it was not shown that it was credible evidence, it being an opinion induced by the appellant cherry picking and glossing the information given to the Revenue to obtain an answer which he wanted.

[8] As the argument proceeded, however, it became clear that there was a prior question to the question whether the evidence should be admitted in this court for the purposes of the determination of the appeal. This prior question related to the question whether the judge, before giving judgment, was aware of the contents of the letter of 17 June 2008 which had contained the material which the appellant argued should be taken into account when determining the issues in the case. Where a trial judge is faced with what is at least an implied application to permit the introduction of fresh evidence before judgment is delivered he must address his mind to the question whether in the interests of justice such material should be admitted or ruled out and he would have to turn his mind to the question whether fairness required that the parties should be given an opportunity to make representations before he either ruled the evidence in or out. Mr Coyle on behalf of the respondent did not dissent from such a proposition.

[9] What effect, if any, the material would have on the outcome of the case is a matter which the trial judge would have to consider and he would have to review any judgment reached in the light of the new material. In the present case the judge was so satisfied that he could reach such a definitive conclusion on the issue whether the investment money was properly applied within time to secure the EIS relief that he decided that it was unnecessary to reach a concluded view on the other issues which might in themselves have precluded EIS relief apart from the issue which the judge regarded as the key one though in fact it was only one of the issues. Thus in paragraph 10 of his judgment the trial judge said:-

> "It is probable on the facts that the relief would have failed for other reasons particularly the loan helpfully set out by Mr Bell but there is no doubt that it failed for the reason (that the investment had not been employed within 12 months of receipt)."

[10] The fact that the judge nowhere refers to the matters which were referred to in the letter of 17 June 2008, whether to reject the material as irrelevant or to reject it as being inadmissible or otherwise, tends to support the view that the judge was not aware of its existence or was not aware of its potential relevance.

[11] Fairness both to the parties and to the trial judge requires that the matter should be remitted to him to reconsider his judgment in the light of the correspondence which the appellant claims was submitted before judgment and in the light of this judgment. He will have to consider the question of how fairly he should deal with the question whether the material should be admitted or rejected. He will have to consider whether he should give the parties an opportunity to make representations as to whether the material should be admitted or not giving reasons for his conclusion on the question. If admitted, whether through the documents or oral evidence or both, he would then have to consider how the material affected the rest of the case if at all. A necessary first question for determination is whether the letter was in fact sent to the Chancery Office on 17 June 2008 as alleged. If the trial judge finds it was not, no application had in fact been made to introduce that evidence before judgment in the trial and the appellant could not seek to rely on that material before the trial judge. A further consequence of such a finding would be that the appellant could not seek to adduce the material before this Court since on his own case it was material which he had in his possession before the conclusion of the trial and he should have sought to adduce it before the trial judge before judgment was delivered.

[12] If the letter of 17 June 2008 had been sent and judge had in fact seen the letter of 17 June 2008 before judgment was delivered fairness requires that the judge should reconsider the matter in the light of the ruling of this court, bearing in mind that the parties were not given an opportunity to make representations on whether the material should be admitted and if so how it should be dealt with.

[13] Bearing in mind the undesirability of leaving unresolved the question whether EIS relief would have failed for other reasons and since those issues would ultimately have to be resolved if the appellant succeeds in his argument before this Court the trial judge should reach firm conclusions on the remaining issues so that if the matter comes back to the Court of Appeal the Court will have before it findings on all relevant issues. The trial judge will reach his conclusions on those other issues in the light of the evidence which

has already been adduced in the course of the trial together with the further material emerging from the letter of 17 June 2008 and in particular the letter of 10 June 2008 (if the trial judge rules that it is to be admitted). The remittal of the proceedings to the trial judge, accordingly, is intended to serve the limited purpose of enabling the trial judge to reach conclusions on those issues and it will not involve the hearing of further evidence.